UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

----------X
Vertis Inc.,

Employer, Case No. 22-RC-061844

and

Local 1, Amalgamated Lithographers
of America, GCC/IBT,

Union.
----------X

UNION'S BRIEF IN SUPPORT OF IT'S EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION ON CHALLENGES AND OBJECTIONS

TABLE OF CONTENTS

Page

Facts....1

A. Procedural History....1

B. The Facility....2

C. The Challenges....3

D. The Employer's Anti-Union Campaign....8

1. The Campaign Literature....9

a. FAQ....9

b. Action Item List....11

2. The Presentation of CEO....13

3. The Interrogations....15

E. The Assault on Union VP by Employer Attorney....16

Questions Presented....20

Legal Argument....23

I. Legal Standard....23

II. The ALJ erred in dismissing the Union's challenges to the ballots of Swercheck and Diaz....23

A. Swercheck and Diaz assumed the vacated supervisor positions....23

B. Swercheck and Diaz were supervisors because they had the authority to engage in supervisory functions even if they did not actual do so during the critical period....25

C. Swercheck and Diaz were ineligible to vote despite the temporary nature of their of their promotions to supervisor positions because those promotions encompassed the entire critical period, were for an indefinite period of time, and carried the possibility of becoming permanent (and did become permanent in the case of Diaz)....27

III. The ALJ erred in dismissing Union Objection No. 3.....28

IV. The ALJ erred in dismissing Union Objection No. 7.....30

A. The ALJ erred in finding that the unalleged evidence of promises of benefits was not reasonably encompassed by Union Objection 7 and could not be considered.....31

B. The ALJ erred in finding that the Employer's promises during the critical period to provide a wage increase in 2012 and to grant other promised benefits was not objectionable.....35

V. The ALJ erred in dismissing Union Objection No. 10.....38

A. The ALJ erred in finding that the unalleged evidence that high level managers and supervisors (other than the Employer's attorney) interrogated employees about their support for the Union is not reasonably encompassed by Union Objection No. 10 and could not be considered.....38

B. The ALJ erred in finding that the interrogations of employees about their support for the Union was not objectionable.....39

Conclusion.....42

TABLE OF AUTHORITIES

Case — Page

Avis Rent-A-Car System, 280 NLRB 580 (1986).....30

Baja's Place, 268 NLRB 868 (1984).....30

Batvia Nursing Inn, 275 NLRB 886, 891 n. 2 (1985).....30

Birmingham Fabricating Co., 140 NLRB 640, 644 (1963).....26

Bloomfield Health Care Center, 352 NLRB 252 (2008).....39

DMI Distribution of Del., 334 NLRB 409 (2001).....38

Dry Wall Products, Inc., 91 NLRB 544 (1950),
enf'd 188 F.2d 362 (3rd Cir. 1951).....23

E.I. Dupont de Nemours & Co., Inc., 210 NLRB 395, 397 (1974).....27, 28

E.L.C. Electric, Inc., 344 NLRB 1200 (2005).....35

Etna Equipment & Supply Co., 243 NLRB 596 (1979).....35

Fred Meyer Alaska, Inc., 334 NLRB 646 (2001).....26

Indiana Refrigerator Lines, 157 NLRB 539 (1966).....27

Latas de Alumino Reynolds, 276 NLRB 1313 (1985).....27

Iowa Lamb Corp., 275 NLRB 185 (1985).....31, 32, 33

J&D Transportation, Case No. 22-RC-13090 (July 22, 2010),
available at 2010 WL 3285382.....33, 34, 35

Meijer Supermarkets, 142 NLRB 513 (1963).....27

Michigan Products, 236 NLRB 1143 (1978).....36

Multi-Ad Services, 331 NLRB 1226, 1228 (2000).....39

NLRB v. Arrow Elastic Corp., 573 F2d 702 (1st Cir. 1978).....38

NLRB v. Exchange Parts Co., 375 U.S. 405 (1964).....38

NLRB v. Rich's Plymouth, 578 F.2d 880 (1st Cir. 1978).....38

Precision Products Group, Inc., 319 NLRB 640 (1995).....31, 32, 33

Rossmore House, 269 NLRB 1176 (1984).....39

Santa Rosa Memorial Hospital, 20-RC-18241 (May 28, 2010),
available at 2010 WL 3285399.....33, 34, 35

Sawyer Lumber Co., 326 NLRB 1331 (1998).....33, 35

St. Francis Fed'n Nurses & Health Prof'ls v. NLRB, 729 F.2d 844 (D.C. Cir. 1984).....37

Stevens Creek Chrysler Jeep Dodge, 357 NLRB No. 57 2011 (2009).....39

Stewart & Stevenson Services, Inc., 164 NLRB 741 (1967).....27

Sun mart Foods, 341 NLRB 161 (2004).....35

United Airlines Services Corp., 290 NLRB 954 (1988).....35, 36

U.S. Gypsum Co., 93 NLRB 91 (1951).....26

Volair Contractors, Inc., 341 NLRB 673 (2004).....26

Wasatch Oil Refining Co., 76 NLRB 417 fn. 17 (1948).....26

Waste Management of Palm Beach, 329 NLRB 198 (1999).....36

NLRB's Guide for Hearing Officers in NLRB Representation and
Section 10(k) Proceedings.....31

Facts

A. Procedural History

The Respondent, Vertis, Inc. (hereinafter, "Employer"), operates a facility in Monroe Township, New Jersey (hereinafter, "facility"), engaged in printing. The Petitioner, Local-1 Amalgamated Lithographers of America GCC/IBT (hereinafter, "Union"), filed a petition on July 28, 2011, seeking to represent a bargaining unit of the Employer's employees at the Facility.[1]

An election was conducted at the facility on August 31, 2011, during the time periods of 7:30 a.m. to 9:00 a.m. (hereinafter, "A.M. vote period") and 4 p.m. to 5:00 p.m. (hereinafter, "P.M. vote period"). The official Tally of Ballots showed that out of approximately 80 eligible voters, 37 votes were cast for the Union, 35 against, and the Union challenged the ballots of Frank Swercheck (hereinafter, "Swercheck") and Luisa Diaz (hereinafter, "Diaz").

On September 7, 2011, both the Union (hereinafter, "Union Objections")and the Employer filed timely objections. On October 14, 2011, the Regional Director issued a Report on Challenged Ballots and Objections and Notice of Hearing (hereinafter, "Regional Director's Report") ordering that a hearing be conducted with respect to Union Objections Nos. 1 through 12, and Employer Objections Nos. I(a), (b) and (c), as well as with respect to the Union's challenges to the ballots of Swercheck and Diaz. A hearing was conducted before

---

[1] On August 10, 2011, the Regional Director approved a Stipulated Election Agreement for an election on August 31, 2011. The bargaining unit was defined in the Stipulated Election Agreement as follows:

> All full-time and regular part-time hourly production, maintenance, shipping and receiving employees in the pre-press department, manual area, finishing department, Kodak pressroom, warehouse, UV coating department, Xeikon pressroom including the following classifications: programmer, proofreader, adjuster, team leader, pressman, assistant pressman, technician, shipper, receiver, electrician and building maintenance, employed by the Employer at its 28 Engelhardt Drive, Monroe, New Jersey facility during the payroll period ending Sunday, July 31, 2011, but excluding all managerial employees, office clerical employees, salaried production and maintenance employee, accounting employees, sales employees, client service employees, professional employees, guards and supervisors as defined in the Act and all other employees.

Administrative Law Judge Raymond Green on the following dates: October 28, 2011; November 7, 15, 18, and 21, 2011. The record was closed at the end of the hearing on November 21, 2011. Judge Green approved the reopening of the record to permit additional documents to be entered into evidence in a letter to the parties dated December 1, 2011.

On December 22, 2011, Judge Green issued a Decision on Challenges and Objections (hereinafter, "Decision"). The Decision, in relevant part, dismissed the Union's challenges to the ballots of Swercheck and Diaz, as well as all of the Union's Objections.

The Union filed exceptions with respect to the challenges of Swercheck and Diaz's ballots, and with respect to Union Objections Nos. 3, 7, and 10.

B. The Facility

The facility operates with three shifts: first shift (generally 7 a.m. to 3 p.m.), second shift (generally 3 p.m. to 11 p.m.), and third shift (generally 11 p.m. to 7 a.m.). (Tr. at 172).

The Facility is organized into several different departments, including: Pre-Press, Press, Quality Control, Finishing, and Shipping. (U. Ex. 18).

At the start of the critical period, the relevant managerial personnel at the Facility in descending order of authority are as follows:

- Steve Flood, Senior Vice President of Operations (hereinafter, "Flood");
- Robert Mayerson, General Manager (hereinafter, "Mayerson");
- Paul Sansouci, Vice President of Operations (hereinafter, "Sansouci");
- Amy Pagano, Senior Human resources Manager (hereinafter, "Pagano");
- Bill McGuigan, Manufacturing Manager (also referred to as Finishing Manager) (hereinafter, "McGuigan");
- Michelle _____, Scheduler (hereinafter, "Michelle").

(U. Exs. 17, 18). The relevant supervisors were as follows:

- Diana Ryder, Manual Insertion Supervisor (hereinafter, "Ryder");
- Mahesh Pophaly, Pre Press Supervisor (hereinafter, "Pophaly"). (U. Ex. 18).

(U. Exs. 17, 18). Other management and supervisory personnel relevant to this case were as follows:

- Tami Harper, Vice President Human Resources (hereinafter, "Harper");
- John Geiger, Technical Services Supervisor at the Employer's facility in Chalfont, PA (hereinafter, "Geiger"). Geiger was transferred to the Facility in the first week of August. (U. Ex. 16, item no. 9). He later became Manufacturing Manager at the Facility on August 29, 2011).

(U. Ex. 17; Tr. at 378).

C. The Challenges

The Union challenged the ballots of Swercheck and Diaz. The basis for the challenge is that on the day that the Employer learned about the Union petition, Swercheck and Diaz, at least temporarily, assumed supervisor positions in the Finishing department, which they held, in the case of Swercheck until two days prior to the election and in the case of Diaz until six weeks after the election at which time the promotion was made permanent.

There are three work areas associated with the Finishing Department: Finishing,[2] Bindery, and Manual Insertion. (Tr. at 173, 174; U. Ex. 18). The Finishing and Bindery areas are located next to each other in the same part of the Facility, while the Manual Insertion area is located in a different part of the Facility. (Tr. at 179).

[2] The Finishing area can also be referred to as the Kerns area because the manufacturer of the machines used in the area is KERNS. (Tr. at 177).

At the start of the critical period there were three supervisors responsible for the Finishing Department: McGuigan, Ryder, and Hauselt. McGuigan was responsible for the entire Finishing Department on the first shift. Hauselt was responsible for the entire Finishing Department on the second shift. Ryder was responsible for the Manual Insertion area only on the first shift. Ryder reported to McGuigan. (Tr. at 177-178; U. Ex. 18). The job descriptions of the three supervisory positions are in evidence. (U. Exs. 26, 27, 29).

It was stipulated at the hearing by the Employer that the positions held by McGuigan and Ryder were supervisory positions within the meaning of the Act. (Tr. at 168-169). As the Finishing Manager, for example, McGuigan had the authority and responsibility to hire additional employees, interview job applicants, transfer employees, promote employees, discipline employees, and to direct employees. (Tr. at 185-190). Ryder had the authority to direct employees. (Tr. at 449-450). *See also* (U. Exs. 26, 27, 29).

McGuigan had an office located in the same part of the Facility as the Finishing and Bindery areas, which he shared with Swercheck. (Tr. at 198). Ryder had an office located in the same part of the Facility as the Manual Insertion work area, which she shared with Diaz and Donald Whalen. (Tr. at 450-451).

Each of the work areas in the Finishing Department had a lead assigned to it on the first shift. The lead in the Finishing work area was Swercheck. (Tr. at 182). The lead in the Bindery area was Miguel Fernandez (hereinafter, "Fernandez"). (Tr. at 182). The lead in the Manual Insertion area was Diaz. (Tr. at 183; U. Ex. 30). It was stipulated in the election agreement by the parties that leads are part of the bargaining unit. The job descriptions of the leads positions in the Finishing department are in evidence. (U. Exs. 20, 22, 24). The job descriptions of the other positions in the Finishing Department are also in evidence. (U. Exs. 21, 23, 25).

On or about August 1, 2011, after learning about the Union's petition, the Employer instituted several changes in management and supervisory positions at the Facility. Mayerson, McGuigan, and Michelle were terminated. Ryder was promoted to Michelle's position as Scheduler. (Tr. at 390-391, 394, 439; U. Ex. 17).

On that same day, the Employer notified the employees in the Finishing Department about these changes. The meeting took place outside McGuigan's office. (Tr. at 190). The meeting included the entire Finishing Department in the Finishing and Bindery areas, and some employees from the Manual Insertion area. (Tr. at 218, 335, 346). Sansouci spoke. (Tr. at 193, 335, 346).

Three Finishing Department employees testified at the hearing about the meeting: John Slemmer (hereinafter, "Slemmer"), Bindery Operator (Tr. at 172); Jovanna Chahua (hereinafter, "Chahua"), employed in the Finishing area (Tr. at 334); and Edwin Pineda (hereinafter, "Pineda"), Machine Operator in the Bindery area (Tr. at 345).

According to the their testimony, Sansouci informed the assembled Finishing Department employees that McGuigan had been terminated and that Ryder was being promoted to Michelle's position as Scheduler. (Tr. at 193-194, 218-219, 335, 346). Sansouci went on to say that temporarily Swercheck would "fill in" or "take over" for McGuigan and Diaz would "fill in" or "take over" for Ryder in those now vacated supervisor positions. (Tr. at 193-194, 218-219, 335, 346).

Slemmer testified in part as follows:

> You, know, Rob Mayerson, Bill McGuigan and Michelle are no longer with us. And either temporarily or in the interim Diana would be filling in for Michelle. Diana, who is the manual insertion supervisor, would be filling in the scheduler's job, Michelle's job. Rob – I mean Frank Swercheck would be filling in Bill McGuigan's job and Luisa Diaz would be filling in Diana's position. When

Diana moved up to the scheduler's job Luisa would be filling in in the manual area.

(Tr. at 193-194).

He – like I just said, he said that Frank would be filling in Bill's stead or – . . . in Bill's position. And Diana would be fill – would be – I think he actually said that Diana would be taking over the scheduler's job. . . . And Luisa Diaz would be filling in for Diana's position as the manual supervisor.

(Tr. at 194).

Paul said as you know there have been some changes made. Michelle is no longer with us. Rob Mayerson is no longer with us. Bill McGuigan is no longer with us. Diana Ryder is going to be taking the position of the scheduler, which is Michelle's position. And again, I'm not sure of the terminology, in the interim or temporarily Frank Swercheck will be filling in for Bill McGuigan. And Luisa Diaz would be filling in Diana Ryder's position as supervisor of the manual area.

(Tr. at 218-219).

Chahua testified as follows:

He informed that Bill will no longer work as supervisor there. That at that time it was going to be represented by Frank. And Diana would be the person to do the schedule. And Luisa was going to take Diana's job.

(Tr. at 335).

And if we have any questions or we have any problem to talk to Frank or him.

(Tr. at 336).

He said at that moment until they got a supervisor, Frank was going to be the person in charge of that.

(Tr. at 340).

Pineda testified as follows:

Well, he said that Bill McGuigan had gotten fired, as well as other people. And that Luisa going to take over for Diana. And Frank was going to be the supervisor in the meantime.

(Tr. at 346). Sansouci did not mention Ferndandez, also a lead like Swercheck and Diaz, who was present at the meeting. (Tr. at 349).

For her part, Ryder claimed that she never vacated the Manual Insertion Supervisor position until October 2011. She claimed that between August 1 and October, 2011, she held both the Manual Insertion Supervisor and Scheduler positions. (Tr. at 442-443). Ryder acknowledged that she increased her reliance upon Diaz during that time. (Tr. at 444, 460-461). Ryder claimed that at the meeting Sansouci stated that he would be filling in for McGuigan but that Swercheck would be assisting him. (Tr. at 447, 459). She stated that there was no mention of Diaz at the meeting whatsoever. (Tr. at 447, 459).

Swercheck testified about the meeting as follows:

> He said that as everybody is aware, Rob Mayerson, Bill McGuigan, and Michelle Shivone are no longer with the company. We are going to continue on as best we can. I'm asking Frank to step in to help. He's going to be my eyes and ears out here. And Diana is going to be the scheduler. And he said if anybody has any questions, our doors are open, come and see us, and we'll help resolve any issues.

(Tr. at 484).

Subsequently, on August 29, 2011, Geiger became the Manufacturing Manager (the equivalent of McGuigan's position), although it is unclear whether that was announced to employees at that time. (U. Ex. 17). Diaz permanently replaced Ryder as the Manual Insertion Supervisor in October 2011. (Tr. at 196, 401). Employees were notified at that time of her permanent appointment. (Tr. at 401).

Slemmer testified at the hearing about a conversation that he had with Swercheck after the August 1, 2011, meeting. (Tr. at 198, 219). Slemmer stated that he asked Swercheck whether he hoped that the interim promotion would become permanent. (Tr. at 198, 219). And, Swercheck responded, saying that he hoped it would. (Tr. at 198, 219). Slemmer also asked

Swercheck if the promotion had changed his views on the Union, and Swercheck acknowledged that it had. (Tr. at 198).

Robert Pinaha (hereinafter, "Pinaha"), who is employed in the Pre-Press Department on the second shift, testified about a conversation that he had with Swercheck. (Tr. at 298). Pinaha stated that he had heard from other employees in the Finishing Department that Swercheck had been promoted. (Tr. at 297-298). So, when Pinaha ran across Swercheck sometime in September, he congratulated Swercheck on the promotion and asked if Swercheck also got a raise. (Tr. at 299). Swercheck responded by saying, "I'm, not sure about the aggravation just yet." (Tr. at 299).

Chahua testified at the hearing that she called out sick on August 24, 2011, and that she notified the Employer by telling Swercheck. (Tr. at 336). Chahua stated that she told Swercheck because she had been told by Sansouci at the August 1, 2011, meeting that he was the supervisor. (Tr. at 336). Pineda also testified that he called out of work in August, and that he notified the Employer by telling Swercheck. (Tr. at 346). Pineda stated that he also told Swercheck because he had been told by Sansouci at the August 1, 2011, meeting that Swercheck was the supervisor. (Tr. at 347).

D. The Employer's Anti-Union Campaign

During the critical period, the Employer engaged in an extensive campaign to persuade the employees to vote against the Union. That campaign included:

- postings of anti-Union literature, including literature that stated that or implied that if the Union won the election, employees would not be able to deal directly with their supervisors;
- the presentation to employees of an anti-union video;
- a captive audience meeting held on August 1, 2011 ,immediately after the Employer learned about the Union's petition;

- a captive audience meeting held on August 29, 2011, just one day before the day of the election, that featured an in-person presentation by the Employer's CEO in which the CEO reminded employees of numerous improvements to employees' terms and conditions of employment that the Employer had made during the critical period and made promises of further improvements, including a wage increase in 2012;

- The campaign also included interrogations of employees by supervisors about their support for the Union;

- improvements to employees terms and conditions of employment and working conditions made during the critical period;

- promises of further improvements to employees' terms and conditions of employment, including a wage increase in 2012, made to employees during the critical period.

The Employer's central message was that the Employer, during the critical period after the Employer had learned about the Union's petition, had implemented numerous improvements to employees' terms and conditions of employment and working conditions and had promised to make further such improvements, including a wage increase in 2012, and that employees should vote against the Union so as not to jeopardize these improvements.

1. The Campaign Literature

The Employer posted or otherwise distributed anti-Union literature throughout the facility. (Tr. at 395-396; U. Exs. 3-16). That literature included promises of improvements to employees' terms and conditions employment and working conditions.

a. FAQ

Specifically, a document titled "Union Organizing FAQ" (U. Ex. 14) (hereinafter, "FAQ"), in paragraph 17 on page 4, described several improvements that the Employer had made during the critical period and also promised to make further improvements. The FAQ states in relevant part:

> 17. **In the past, I have been frustrated with the Company concerning important issues to me, like untimely notice of Weekend Scheduling,**

Maintenance ineffectiveness, no communication between incoming and departing shifts, not enough manpower, etc.

However, it does appear that Management is listening and taking actions to resolve these concerns. Will this continue in the future?

Answer: Vertis Leadership is aware that many of our Employees have become frustrated with a lack of action and follow-up on items that are important to each of you. To this end, we are devoting resources to assist Local Monroe Management on improving our workplace.

Some of these initiatives you may have already notice, such as:

- Replaced Local Management.
- Advanced Notice of Weekend Scheduling.
- Hiring ten (10) temporary employees to full time status.
- Improvement in Employee and Plant Communications Boards.
- Involved and accessible leadership on the plant floor.

Other initiatives are currently in process are:

- Maintenance Effectiveness Workflow
- Shift Changeover Process
- Diversity and Sensitivity Training
- Clamp Truck Training in Press Room
- Electronic Hand Truck equipment in Warehouse
- Renting Spot Coolers for UV Coating Area

As many of you are aware, much work remains. Changing how we work in Monroe will take time and patience from all. However, local Monroe Management is committed to improving how we work and communicate. Vertis Monroe Leadership wants the opportunity to demonstrate this, not through words and talk, but by our behaviors and actions. Unlike the Union, we are prohibited from making promises to you. All we can do is continue to work on improving our workplace.

(U. Ex. 14, par. 17, pg. 4). The FAQ uses these improvements as an argument for why the employees should vote against the Union, saying, "A vote 'no' is a vote for giving the Company at least one (1) year to continue demonstrating that Vertis is listening to your needs and addressing your concerns." (U. Ex. 14). The FAQ was posted and distributed to employees during the critical period. (Tr. at 395-396).

b. Action Item List

The Employer also posted an "Action Item List." (U. Ex. 16) (hereinafter, "Action Item List"). This list was first posted in the Facility in the second week of August 2011. (Tr. at 414). The Action Item List is a spreadsheet listing numerous improvements that the Employer intended to implement at the Facility, the manager or supervisor responsible for the implementation of these improvements, and the date at which the Employer intended such implementation to be completed. (Tr. at 413). Updated versions of the Action Item List were posted throughout the critical period. (U. Exs. 16 a, b, c, d). Most of the improvements listed in the Action Item list are listed as intended to be completed during the critical period. (U. Ex. 16). Some are listed as intended to be completed in September, 2011. (U. Ex. 16).

Harper testified at the hearing about the Action Item List. She stated that the Employer's CEO visited the Facility on July 21, 2011. (Tr. at 395). However, she was not present at that meeting and no one else who was present testified at the hearing. (Tr. at 431). Thus, there is no competent evidence in the record as to whether meeting actually happened, who was present, or what was said. Nonetheless, Harper opined that at the meeting the CEO discussed employees' concerns at the meeting and produced a written list from which the Action Item List was generated. (Tr. at 399). She claimed to have actually seen parts of that written list. (Tr. at 412). And, she claimed that the Employer made the decision to begin implementing the Action Item List in July 2011, outside the critical period. (Tr. at 399-400). However, there is in fact no written action item list created by the CEO after the July 21, 2011, meeting. And, it is undisputed that there was no communication of the Action Item List to the employees prior to the second week of August, 2011. There is in fact another action item plan that applies to the

Employer nationwide, which is referred to in the July 13, 2011, streaming video, and which deals with wage increases, 401k, and tuition reimbursements. (Tr. at 413, U. Exs. 1[on pg. 44], 28).

The reference in the Action Item list to "Create and Implement new OT scheduling process" (item no. 10) refers the implementation of a new procedure for employees to volunteer for overtime and to receive advanced notification of overtime. (Tr. at 208, 272-273, 417). *See also* (U. Ex. 14, "Advanced Notice of Weekend Scheduling"). That new procedure was implemented during the critical period. (Tr. at 273, U. Ex. 16).

The reference on the Action Item List to "Rent Spot Coolers for Employees in UV Coating Area" (U. Ex. 16, item no. 20) refers to coolers that were rented by the Employer during the critical period to cool the temperatures in the UV Coating area, a problem that employees had been complaining about. (Tr. at 211, 275-276). *See also* (U. Ex. 14, "Renting Spot Coolers for UV Coating Area"). This improvement was implemented in the second week in August. (U. Ex. 16).

The reference to "Recognition Program/kudos reinstatement" (U. Ex. 16, item no. 16) refers to an incentive rewards program which the Employer acknowledged was not implemented for second shift employees and was implemented during the critical period. (Tr. 418) This improvement was implemented in the second week of August. (U. Ex. 16).

The reference to "Implement Improved Maintenance Effectiveness workflow" (U. Ex. 16, item no. 44) refers to a process for ensuring that equipment is running. (Tr. at 276-277, 419). *See also* (U. Ex. 14, "Maintenance Effectiveness Workflow"). This improvement was implemented in the third week of August. (U. Ex. 16).

The reference to "Pressroom scheduling collaboration" (U. Ex. 16, item no. 17) refers to a change in the Employer's policy to allow employees to stay over at the end of their shift a few

minutes to assist the next shift. (Tr. at 277, 419-420). *See also* (U. Ex. 14, "shift changeover process"). This improvement was implemented in the second week of August. (U. Ex. 16).

The reference to "Schedule Clamp/Forklift Truck Training" (U. Ex. 16, item no. 41) refers to the scheduling of training for the clamp truck and forklift on the second and third shifts where employees have not had the opportunity to receive such training. (Tr. at 278). This improvement was implemented in the first week of September, but promised to employees when the Action Item list was first posted in the second week of August. (U. Ex. 16).

2. The Presentation of CEO

On August 29, 2011, the Employer held a captive audience meeting at the Facility that featured a presentation by the Employer's CEO. (Tr. at 262-263, 397-398; U. Exs. 13, 14). There was a PowerPoint presentation that accompanied that presentation. (U. Ex. 2). During the presentation, the CEO promised employees a wage increase in 2012. (U. Ex. 2, pg. 7). The CEO stated, however, that there was "no guarantee." (Tr. at 264, 304).

During the presentation, the CEO also listed out various improvements to the employees' terms and conditions of employment and working conditions that the Employer had already made at the Facility and promised to make further improvements. (U. Ex. 2, pgs. 3-6). In the PowerPoint presentation, the improvements that the CEO claimed had already been implemented (during the critical period) are listed under the title, "Changes So Far," and the improvements that the CEO promised to make in the future are listed under the title, "What Still Needs to Be Accomplished?" (U. Ex. 2, pgs. 3-6). The improvements listed by the CEO include many of the same improvements listed in the FAQ and Action Item List. (U. Exs. 2, 14, 16). The PowerPoint states in relevant part:

CHANGES SO FAR

- Since the date I found out about the issues we have made good progress cleaning things up.
- Workplace improvement initiatives that have been completed:

    - Immediately fired GM as well as other local management
    - Implemented a formal process to provide advance notice of weekend scheduling so each of you can better plan your lives away from work
    - Hired ten (10) temporary employees to full time status
    - Improved plan employee & plant communications boards and processes
    - Implemented a process that ensures we conduct more employee communication meetings to share what is happening in our business
    - Re-stated and enforced the Plant Kudos recognition program
    - Rented equipment to assist you in performing your jobs
    - Installed A/C units in UV Coating are to make your workplace as comfortable as possible
    - Ensured you have involved and accessible leadership on the plant floor
    - Updated and improved Maintenance Effectiveness Workflow
    - Updated and improved Shift Changeover Process
    - Brought back a proven Sr. Operations leader, Dave Colatriano

WHAT STILL NEEDS TO BE ACCOMPLISHED?

- Other Critical initiatives currently in process are:
    - Diversity and Sensitivity Training is scheduled
    - Clamp Truck Training in Press Room is scheduled
    - Plant Newsletters will be issued regularly
    - Revamped Round Table Meetings with Employees

(U. Ex. 2, pgs. 3-5).

The decision to include the wage increase in 2012 in the 2012 preliminary budget was made in June or early July, 2011, and announced to some employees on July 13, 2011, prior to the start of the critical period by the Employer's CEO in a streaming video. (Tr. at 316, 383; U. Ex. 28). The video was not shown to employees on the third shift until August 13, 2011. (Tr. at 403). There is a PowerPoint presentation that accompanied the streaming video. (U. Ex. 1). However, no decision had been made prior to the start of the critical period about the timing and

amount of the wage increase. (Tr. at 410). During the meeting, the CEO made clear that the wage increase was contingent upon the financial success of the Employer in 2011 and 2012. (U. Ex. 1, pg. 34, "Success will determine amount and timing"). The lack of a wage increase over several years, including a wage cut, was a major source of support for the Union and the Employer knew that employees were unhappy about it. (Tr. at 238, 265, 379-380). The Employer had conducted an employee survey in January 2011, which indicated that employees wanted a wage increase. (Tr. at 380-381).

3. The Interrogations

Top management personnel and supervisors interrogated employees about their support for the Union during the critical period. Two Union witnesses – Wilson Echeverry (hereinafter, "Echecverry") and Pinaha – testified at the hearing that they had been subjected to such interrogations.

Echeverry, a Digital Press Operator, testified that during the critical period Geiger approached him at his work station and asked him what he thought about the Union. (Tr. at 243-244). Geiger had no reason other than the Union to speak to Echeverry. Geiger was not Echeverry's supervisor. Geiger did not speak to Echeverry during this conversation about any other matter except the Union. Geiger did not tell Echeverry that he did not have to answer his question about the Union. (Tr. at 254-255). Echecverry was afraid to tell Geiger that he supported the Union and said only that he did not think much about the Union. (Tr. at 244).

Echeverry stated that during the critical period Steve Flood, a high level manager, approached Echeverry a few times to ask about his support for the Union. (Tr. at 244-245). Flood asked Echeverry what he thought about the Union. (Tr. at 245). Flood also disparaged the Union saying that unions "stop the company from growing." (Tr. at 245). Flood had no reason

for speaking to Echeverry other than to talk to him about the Union. Flood was not Echeverry's direct supervisor. Flood did not talk to Echeverry about any other matter during these conversations except about the Union. Flood did not tell Echeverry that he did not have to answer the questions about the Union. (Tr. at 255). Echeverry told Flood that he does not like unions because he was afraid to tell Flood that he supported the Union. (Tr. at 245, 251). Echeverry did not tell the Union about these conversations with Geiger and Flood until after the elections. (Tr. at 257).

Pinaha stated that during the critical period prior to the day of the election, Mahesh Pophaly, Pinaha's direct supervisor, approached Pinaha in the kitchen and asked him whether he was in favor of the Union. (Tr. at 306). Pinaha said that he was keeping an open mind but leaning towards the Union. (Tr. at 306). Pophaly had no reason to talk to Pinaha in the kitchen except to ask him about the Union. Pophaly did not talk to Pinaha during this conversation about any other matter except the Union.

E. The Assault on Union VP by Employer Attorney

During the election, immediately prior to the start of the P.M. vote period, the Employer's attorney, John Gilman (hereinafter, "Gilman"), assaulted the Union's Vice President, Anthony Paretti (hereinafter, "Paretti") in the presence of a voter in the climax of an argument that the attorney started arising out of Paretti's representation of the Union in the election proceeding. Several witnesses testified about the incident for the Union, including Paretti; David Cann (hereinafter, "Cann"), the Union's attorney; Michael Doklia (hereinafter, "Doklia"); Ricky Putnam (hereinafter, "Putnam"), an organizer with the Union's International; and Visconti, the Union's election observer in the P.M. vote period. Although several Employer representatives were present during the incident, incredibly only one witness testified about the incident for the

Employer, Wilburn.[3] All of the witnesses that testified agree that Gilman made the first and only physical contact in the incident by pushing Paretti's hand, and no witness that testified claimed that Paretti started the argument.

Gilman's hostility to Paretti was established earlier in the day when he insulted Paretti's Italian heritage. Both Paretti and Cann testified that immediately after the A.M. vote period had ended, the parties met in the polling area. (Tr. at 58). At that time, Gilman insulted Paretti's Italian heritage by saying that he should go eat his meatballs. (Tr. at 58). Paretti stated that Gilman said to Paretti, "Oh, yeah, go have your meatballs." (Tr. at 84). Paretti understood the remark to be an ethnic slur. (Tr. at 84, 95). Cann stated that Gilman said to Paretti: "What, are you going out for meatballs?" (Tr. at 58).

All of the Union witnesses testified that Gilman's assault on Paretti began with a dispute about whether Visconti could serve as the Union's election observer since he had not gotten prior approval to be released from work. (Tr. at 59, 85, 119-120). When the parties returned to the polling area immediately prior to the start of the P.M. vote period, Gilman seemed "very uptight." (Tr. at 85). Initially Gilman took the position that Visonti could not serve as the Union's election observer. (Tr. at 58-59, 85). But, Gilman was apparently overruled by the other Employer representatives there, and it was agreed that Visonti would serve as the observer after clocking out. (Tr. at 59, 85-86).

Subsequently, Paretti asked Harper if she had also clocked out. (Tr. at 59-60, 77, 86). Paretti pointed to Wilburn and said to Harper, "Is that young lady, did she have to clock out also?" (Tr. at 86). Paretti's tone of voice was normal and pleasant. (Tr. at 86). At that point Gilman inexplicably became enraged, ran across the entire length of the lunch room to where

[3] The following persons were present for the Employer: Sansouci; Harper; Susan Zoch, the Employer's In-House Attorney; and Rob Schvari, who was affiliated with the Employer's Human Resources Department. (Tr. at 29-30). Also present were the Board Agent and his assistant.

Paretti was standing, got in Paretti's face, began yelling and cursing at him, and began pointing his finger in Paretti's face. (Tr. at 61, 86, 106). "[Gilman] got really upset and comes barreling across the room . . . ." (Tr. at 106). Paretti put his hands up and said get out of my face. (Tr. at 60, 86). Gilman said, "You don't talk to her." (Tr. at 60, 86). Gilman said, "You don't ask her questions, blah, blah, blah. That's not your job, blah, blah, blah." (Tr. at 107). Paretti said, "Get out of my face." (Tr. at 60, 86). Paretti said, Don't put your hands on me." (Tr. at 108, 120). Gilman used profanity, but Paretti did not. (Tr. at 62, 87, 88, 111-112, 121). Both Gilman and Paretti were loud. (Tr. at 62, 111-112). Paretti did not point his finger in Gilman's face. (Tr. at 67). Gilman did not say to Paretti, "Get your hand out of my face." (Tr. at 68, 96, 111-112).

Gilman then escalated the incident further by grabbing Paretti's arm or hand and pushing it into Paretti's chest. (Tr. at 60, 87, 106, 120, 280-281). Cann and Putnam stepped in between Gilman and Paretti. (Tr. at 60, 107). Visconti, a voter, was present during the incident. (Tr. at 66).

After the incident Paretti apologized to the Employer representatives present. (Tr. at 88). A male Human resources person [Rob Schavi?] said to Paretti, "You should not let him get away with that." (Tr. at 88).

After the incident Gilman approached Paretti outside the lunch room and attempted to apologize. (Tr. at 63-64, 89, 108). Gilman placed his hand very close to Paretti's chest. (Tr. at 89). Paretti said, "I don't want it. Stay away from me. Leave me alone." (Tr. at 89). Paretti said, "Just go away." (Tr. at 109). Putnam then intervened and Gilman left. (Tr. at 89). Paretti heard Gilman say to Putnam, "I wouldn't do that to you, you're too big for me." (Tr. at 89). Gilman said to Putnam, "You would have done it too if you – if you had saw him point his finger at a woman." (Tr. at 109).

Gilman also insulted Putnam during the election. After learning that Putnam had misspelled word "duress," Gilman said to Putnam, "Don't they offer you any level of higher education at the Teamsters?" (Tr. at 110). Putnam responded, "I don't think I need much more education to beat you. We did it in Chalfont, we'll do it here." (Tr. at 110).

During the vote count Gilman again seemed very agitated. (Tr. at 65, 90). While Paretti signed the official Talley of Ballots on behalf of the Union, Gilman bumped his body into Paretti's several times. (Tr. at 65-66, 90). Paretti said, "What are you trying to do here? What are you looking to provoke, an incident here?" (Tr. at 90). Gilman refused to sign the Tally of Ballots, and so had no reason to be at the table other than to bump into Paretti. (Tr. at 66).

The only witness to testify about the incident for the Employer was the Employer's election observer, Wilburn. (Harper, who was present during the incident and who testified at the hearing did not testify about the incident. Gilman and the other Employer representatives present for the incident did not testify.) Wilburn acknowledged that Gilman pushed Paretti's hand and that this was the first and only physical contact between them. (Tr. at 34). However, her testimony differed from the testimony of the Union witnesses in that she stated that Paretti pointed his finger in Gilman's face, that Gilman said to Paretti to get his hand out of Gilman's face, and that he then pushed Paretti's hand away. (Tr. at 19, 20, 34). She also stated that Paretti used profanity, but that Gilman did not. (Tr. at 24). She stated that she did not see how the incident started. (Tr. 34).

Questions Presented

The ALJ dismissed the Union's challenges to the ballots of Swercheck and Diaz. The ALJ held: (1) Swercheck and Diaz did not assume supervisor positions; (2) even if the Employer told employees that Swercheck and Diaz were taking over the supervisor positions that is not in itself sufficient evidence to meet the Union's burden of proof because the Union must prove that Swercheck and Diaz actually engaged in supervisor functions during the critical period; and (3) even if Swercheck and Diaz did take over the supervisor positions that did not make them ineligible to vote because their assumption of the supervisor positions was merely temporary in nature. The Union asserts that: (1) Swercheck and Diaz assumed the supervisor positions vacated by McGuigan and Ryder; (2) the Employer announced to employees that Swercheck and Diaz were "taking over" the supervisor positions and that announcement was sufficient proof to meet the Union's burden to establish their supervisory status; and (3) the assumption of supervisory positions, even though temporary, made Swercheck and Diaz ineligible to vote because their appointments were for an indefinite period of time and carried the possibility of becoming permanent (and in the case of Diaz did become permanent).

The ALJ dismissed Union Objection No. 3, which alleged that the Employer's attorney, Gilman, assaulted the Union Vice President, Paretti, in the polling area immediately prior to the start of the voting and in the presence of one voter. The ALJ found that the incident was too minor to require setting aside the election because: (1) the argument was short and Gilman merely slightly shoved Paretti; (2) the incident did not cause the voter who witnessed it to change his mind about how he would vote; and (3) the incident was only witnessed by one voter. The Union asserts that he incident was far from minor, constituting an unprovoked attack in the polling area immediately prior to the start of the voting that was witnessed by a sufficient

number of voters to affect the outcome of the election. The Union asserts that whether the voter that witnessed the incident changed his mind about how he would vote is irrelevant, since the proper legal standard in an objective one.

The ALJ dismissed Union Objection No. 7, which alleged that the Employer promised employees a wage increase in 2012 in order to induce them to vote against the Union. Evidence was also introduced at the hearing that the Employer made promises of other benefits during the critical period in addition to the promised wage. The ALJ found that the evidence of the Employer's promises of other benefits made during the critical period was unalleged and not reasonably encompassed by Union Objection No.7, and so could not be considered. The ALJ found that the decision to promise the wage increase in 2012 was made prior to the start of the critical period and announced to at least some employees prior to the start of the critical period, and so was not objectionable. The Union asserts that the unalleged evidence of promises of other benefits is reasonably encompassed by Union Objection No. 7. The Unions asserts that the Employer promises of a wage increase and other benefits made during the critical period are objectionable.

The ALJ dismissed Union Objection No. 10, which alleged that the Employer's attorney, Gilman, interrogated employees about the support for the Union. Evidence was introduced at the hearing that two employees were interrogated by high level managers and supervisors other than the attorney. The ALJ found that that evidence of the interrogations was not alleged and was not reasonably encompassed by Union Objection No. 10, and so could not be considered. The Union asserts that the unalleged evidence of interrogations is reasonably encompassed by Union Objection No. 10, and so should be considered. The Union asserts that the unalleged evidence

proves that employees were coercively interrogated by high level managers and supervisors about their support for the Union which interfered with those employees' free choice.

Legal Argument

I. Legal Standard

In *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), *enf'd* 188 F.2d 362 (3rd Cir. 1951), the Board set forth the standard of review followed by the Board when reviewing a decision of an Administrative Law Judge. The Board said:

> Accordingly, in all cases which come before us for decision we base our findings as to the facts upon a de novo review of the entire record, and do not deem ourselves bound by the Trial Examiner's findings. Nevertheless, as the demeanor of witnesses is a factor of consequence in resolving issues of credibility, and as the Trial Examiner, but not the Board, has had the advantage of observing the witnesses while they testified, it is our policy to attach great weight to a Trial Examiner's credibility findings insofar as they are based on demeanor. Hence we do not overrule a Trial Examiner's resolutions as to credibility except where the clear preponderance of all the relevant evidence convinces us that the Trial Examiner's resolution was incorrect.

Id. at 545. Thus, the Board reviews the findings as to fact and law upon de novo review of the entire record. But, as to credibility determinations, in so far as they are based on the demeanor of the witness, the Board will overrule the Administrative Law Judge only upon the clear preponderance of all the relevant evidence.

II. The ALJ erred in dismissing the Union's challenges to the ballots of Swercheck and Diaz.

A. Swercheck and Diaz assumed the vacated supervisor positions, at least temporarily.

On the same day that the Employer learned about the Union's petition it announced to employees that Swercheck and Diaz were "filling in" or "taking over" recently vacated supervisor positions of McGuigan and Ryder.

The following is undisputed. On the same day as the Employer learned that the Union filed the petition, the Employer terminated Michelle from the Scheduler position, and McGuigan

from the Manufacturing Manager position. The Employer also promoted Ryder to the Scheduler Position from her position as Manual Insertion supervisor. It is also undisputed that the Employer held a meeting in the Finishing department at which it informed the employees in that department of these changes.

Three witnesses, all employees in the Finishing department, testified at the hearing that at the meeting the Employer also stated that two of the three leads in the Finishing department, Swercheck and Diaz, would be "taking over" or "filling in" in the recently vacated supervisor positions. Specifically, Swercheck would be "taking over" or "filling in" for McGuigan in the Manufacturing Manager position, and Diaz would be "taking over" or filling in" for Ryder in the Manual Insertion Supervisor position. Two witnesses, called by the Employer, testified at the hearing that the Employer did not say that and that Swercheck and Diaz were never promoted even temporarily to those supervisor positions.

The ALJ found that Swercheck and Diaz had not assumed supervisor positions based on the testimony of Swercheck that he had not assumed a supervisor position and the testimony of Ryder that Diaz had not assumed a supervisor position. However, the testimony of Swercheck and Ryder was self serving at best and not credible. Moreover, the ALJ apparently did not consider the impact of the evidence regarding the meeting at which employees were told that Swercheck and Diaz would be assuming the supervisor positions. Three employees present at the meeting all testified that they were told that Swercheck and Diaz would be "taking over" or "filling in" in for McGuigan and Ryder. Since the ALJ did not make any factual findings or credibility determinations with respect to what employees were told at the meeting, it is clear that the ALJ failed to consider the importance of that evidence in reaching his findings.

The only reasonable interpretation of the statements made at the meeting that Swercheck and Diaz would be "taking over" or "filling in" for McGuigan and Ryder is that the Employer was vesting Swercheck and Diaz, at least temporarily, with the same authority and responsibilities as the former supervisors. The remarks could not have been intended merely to reinforce Swercheck and Diaz's existing authority as leads, since if that had been the case then Fernandez, the third lead in the Finishing department who was present at the meeting, would also have been mentioned. Certainly, the employees in the Finishing Department understood Diaz and Swercheck to be their supervisors after the meeting, referring to and treating them as such thereafter, including calling in to Swercheck to report absences. Moreover, if Swercheck and Diaz did not assume the supervisory positions, then who did? Without a Manufacturing Manager, the Finishing and Bindery areas within the Finishing department did not have any supervisor on the first shift. And, without the Manual Insertion supervisor, the Manual Insertion area within the Finishing department did not have a supervisor on the first shift. It is simply not credible that the Employer left the Finishing department without any supervisor on the first.

The clear preponderance of the evidence supports the conclusion that Swercheck and Diaz assumed the recently vacated supervisor positions, at least temporarily, and that this was announced to employees in the Finishing department.

B. Swercheck and Diaz were supervisors because they had the authority to engage in supervisory functions even if they did not actual do so during the critical period.

The ALJ held that, "[e]ven assuming that employees had been told in early August that Swercheck and Diaz were temporarily assuming supervisory positions, this is, in my opinion, not sufficient to meet the Union's burden of proof." (Decision, pg. 3). The ALJ continued, reasoning that, "[t]here was no evidence that they actually exercised supervisory authority during

the relevant period and there is no evidence that there was any actual change in their official status or pay." (Decision, pg. 3). Under established Board law, where an employer clothes an employee with the authority to engage in supervisory functions, as this Employer did in this case when it announced to employees that Swercheck and Diaz were "taking over" or "filling in" the recently vacated stipulated supervisory positions, that is sufficient to establish that employee's supervisory status whether or not the employee actually exercises supervisory functions during the critical period. The Union simply is not required to show that Diaz and Swercheck actually took supervisory actions during the critical period after their appointment to the supervisor positions.

Persons who possess the authority spelled out in the statutory definition contained in Section 2(11) are supervisors even if the authority has not yet been exercised. *See, e.g., Fred Meyer Alaska, Inc.*, 334 NLRB 646 fn. 8 (2001); *U.S. Gypsum Co.*, 93 NLRB 91 (1951); *Wasatch Oil Refining Co.*, 76 NLRB 417 fn. 17 (1948). A person has authority to exercise supervisor functions if they have been notified as such. *Volair Contractors, Inc.*, 341 NLRB 673 (2004). Where the employer has "clothed" a person "with apparent authority to speak for it" the employer "may fairly be said to be responsible for his conduct." *Birmingham Fabricating Co.*, 140 NLRB 640, 644 (1963)(holding that employer responsible for conduct of persons held out by employer to be supervisors).

It is undisputed that the vacated positions of Ryder and McGuigan were supervisor positions within the meaning of the Act. So, if Diaz and Swercheck were vested with the same authority as Ryder and McGuigan – and that they were so vested is the only reasonable interpretation of the statements that Diaz and Swercheck would be "filling in" or "taking over"

for the former supervisors – then they are supervisors whether or not they actually exercised any such functions during the critical period or after.

C. Swercheck and Diaz were ineligible to vote despite the temporary nature of their of their promotions to supervisor positions because those promotions encompassed the entire critical period, were for an indefinite period of time, and carried the possibility of becoming permanent (and did become permanent in the case of Diaz).

The ALJ held that "[e]ven if there was some evidence that Diaz and/or Swercheck actually performed supervisory functions during this period, their assignment as "temporary" supervisors would not make them ineligible to vote as it is clear to me that any such assignment was of a limited duration." (Decision, pg. 3).

Persons exercising supervisor positions only temporarily, seasonally, or sporadically, are not normally ineligible to vote because, in most situations, temporary supervisor assignments may properly be viewed as relatively insignificant interludes in regular employee assignments. *Latas de Alumino Reynolds*, 276 NLRB 1313 (1985); *Stewart & Stevenson Services, Inc.*, 164 NLRB 741, 742 (1967) ("sporadic assumption of supervisory duties, e.g., during annual vacation periods of a regular supervisor, is not sufficient to establish supervisory status at other times"); *Meijer Supermarkets*, 142 NLRB 513 (1963); *Indiana Refrigerator Lines*, 157 NLRB 539 (1966).

However, the Board has held that temporary supervisors are ineligible to vote where their promotions, far from being temporary interludes, were for indefinite periods of time and where they had a prospect that the supervisor position may become permanent. *E.I. Dupont de Nemours & Co., Inc.*, 210 NLRB 395, 397 (1974) (temporary foreman appointed for indefinite period of time with possibility of promotion to foreman permanently held ineligible to vote). The Board reasons that:

> [Bargaining] unit employees have the right to engage in union activities and in the choice of a collective bargaining representative free from participation of individuals who have been their chief, and perhaps only, supervisors for indefinite periods of time; who at the time of the election appeared to have prospects of continuing in a supervisory role for further periods; and, perhaps most importantly, whose loyalty the employer could and undoubtedly would, demand during the preelection period.

The clear preponderance of the evidence establishes that temporary assignment of Swercheck and Diaz to the supervisor positions was for an indefinite period of time – in Swercheck's case covering almost the entire critical period and in Diaz's case continuing after the election for an additional six weeks at which time it was made permanent. Significantly, in relation to the reasoning of *E.I. Dupont*, Swercheck and Diaz changed their views about the Union and campaigned against the Union after their promotions.

The ALJ erred in dismissing the Union's challenges to the ballots of Swercheck and Diaz.

III. The ALJ erred in dismissing Union Objection No. 3.

Union Objection No. 3 alleges that Employer's attorney, Gilman, assaulted the Vice President of the Union, Paretti, in the polling area immediately prior to the start of the voting period in the presence of one voter.[4] The ALJ dismissed this objection, finding that, "[t]his incident is, in my view rather minor and was witnessed by only one employee whose vote was not influenced by the incident." (Decision, pg. 5). The ALJ erred in that the incident was far from minor but in fact an especially egregious act of unprofessional conduct designed to intimidate employees from participating in the election.

---

[4] Union Objection No. 3 states:

> The Employer destroyed the laboratory conditions necessary for a fair election when it engaged in violence, threats of violence to create an atmosphere of fear and coerce employees to vote against the Union. The Employer's attorney attacked a Union representative in the election place during the election, in the presence of employees, including a voting member of the bargaining unit. This attack took place as the second voting session was beginning and as voters were assembling around the voting place.

The ALJ held that, "there was a short argument between the Company lawyer and the Union's business agent. All witnesses agree that this was an extremely brief exchange of angry words and that at most the company's lawyer may have slightly shoved the union agent or pushed his hand away." (Decision, pg. 5). The ALJ's findings ignore several important facts established a clear preponderance of the evidence. First, the argument was started by the Gilman who became inexplicably enraged because Paretti pointed at the Employer's observer while asking an Employer representative a question about the observer. A dispute had arisen about whether the Union's election observer could be released from work. Gilman, seeking to deprive the Union of an election observer during the hearing, took the position that the observer could not be released from work. Gilman was overruled by his client, who agreed to release the employee from work provided he clocked out. Paretti then asked an Employer representative if the Employer's election observer had likewise been required to clock out. At that point, Gilman became enraged and ran clear across the entire length of the room to reach Paretti, got in his face, and began shouting and using profanity. The incident ended with Gilman shoving Paretti. Second, the incident occurred in the polling area immediately prior to the start of the voting. The ALJ makes no mention of the significance of this fact, and discounts the seriousness with which the Board and the courts protect the polling area with higher standards than apply in areas removed from the polling area. Third, the argument concerned the conduct of the election and was not about some ancillary or otherwise irrelevant matter. Fourth, this incident concerned the Union's election observer, an eligible voter, who witnessed the incident. As the subject matter of the dispute, the impact of witnessing it was certainly greater on the observer than on other witnesses. Moreover, Gilman's objective during the dispute was actually to prevent the Union's election observer from participating in the election. Fifth, the assault was only the most

egregious of the Gilman attorney's conduct during the course of the election. Prior to the assault, for example, he had insulted Paretti's Italian heritage. And, Gilman also insulted the intelligence of another Union representative present during the election.

The ALJ erred in considering whether the employee that witnessed the incident actually changed his vote as a result. The question of whether the assault made a free and fair election impossible is an objective one to which the subjective reaction of the employee witness is irrelevant. An assault on a union representative in the polling area, immediately prior to the start of the voting, provoked by the union representative's efforts to ensure participation of the Union's election observer, is the kind of conduct which tends to interfere with a free and fair election.

Moreover, the ALJ erred in holding that the incident was not witnessed by a sufficient number of employees to set aside the election. It is well-established that one of the factors considered in determining whether to set aside an election based on conduct is the closeness of the election. *Baja's Place*, 268 NLRB 868 (1984). *See also Avis Rent-A-Car System*, 280 NLRB 580 (1986) (listing factor considered); *cf. Batvia Nursing Inn*, 275 NLRB 886, 891 n. 2 (1985) ("An employer violates Section 8(a)(1) of the Act, by assaulting a union representative when it does so in the presence of **one or more employees** under circumstances where onlookers would likely infer from the assault that the employer would also retaliate in the same fashion against any employee who supported the Union.") (emphasis added). In this case, although the incident was witnessed by only one employee, in a tied election even one vote is outcome determinative. So, even though the Employer attorney's conduct only coerced one employee that should be sufficient in this case to warrant setting aside the election.

IV. The ALJ erred in dismissing Union Objection No. 7.

A. The ALJ erred in finding that the unalleged evidence of promises of benefits was not reasonably encompassed by Union Objection 7 and could not be considered.

Union Objection No. 7 alleges that the Employer promised voters that it would increase their wages in 2012.[5] Evidence was also introduced at the hearing that the Employer made promises of other benefits to employees during the critical period in addition to the wage increase. Those promises are contained in the FAQ, Action Item List, and the CEO's presentation at the captive audience meeting held two days prior to the election. The ALJ held that this evidence was unalleged and was not reasonably encompassed by Union Objection No. 7, and so could not be considered. The ALJ erred. The evidence is reasonably encompassed by Union Objection No. 7 and should be considered.

An election may be set aside only on the basis of evidence that is "reasonably encompassed" by the Objections and the Regional Director's Report on the Objections. The NLRB's Guide for Hearing Officers in NLRB Representation and Section 10(k) Proceedings, at page 141, states in relevant part:

> The parameters of the hearing on objections/challenges is the Regional Director's Supplemental Decision or Report on Objections/Challenges or Notice of Hearing, which sets forth the objectionable conduct asserted and/or the challenges in issue. The hearing officer must limit the hearing to the matters that the Regional Director has set for a hearing. The hearing officer has the authority to consider only the issues that are reasonably encompassed within the scope of the specific objections set for the hearing by the Regional Director.

The leading cases on this issue are *Iowa Lamb Corp.*, 275 NLRB 185 (1985), and *Precision Products Group, Inc.*, 319 NLRB 640 (1995). In *Iowa Lamb*, the Board held that the

---

[5] Union Objection No. 7 states:

> The Employer destroyed the laboratory conditions necessary for a fair election when it made promises of raises if the employees voted against the Union, both before and on the day of the election.

hearing officer erred in setting aside an election on the basis of evidence that was "wholly unrelated" to the objections set for hearing by the Regional Director and which the employer had not had a full opportunity to litigate. 275 NLRB at 185. The hearing officer had set aside the election based on a statement that the employer made to employees that it was seeking improved health insurance for the employees. *Id.* The Board explained its decision as follows:

> The Petitioner did not allege that the statement was objectionable, the Regional Director did not identify it as an issue in his order directing hearing, and at the hearing the hearing officer did not inform the parties he would consider it in his report. Further, based on our review of the record, we find that the issue was not fully litigated. We therefore conclude that the hearing officer erred in considering an issue that was not fully litigated and was wholly unrelated to the issues set for hearing.

Id.

In *Precision Products*, the Board held that the hearing officer erred in setting aside an election on the basis of evidence relating to an objection that was not set for the hearing. 319 NLRB at 641. The union's objections had originally included the allegation that it told employees that it would "bargain from scratch" if the union won the election. *Id.* at 640. However, prior to the issuance of the Regional Director's Report the union withdrew the objection. *Id.* The Regional Director's Report set a hearing to consider certain of the union's other objections, including the allegation that the employer raised employees' wages during the critical period. *Id.* The hearing officer dismissed the objection alleging wage increases but set aside the election based on the "bargain from scratch" statement, reasoning that the statement was "closely related to the issue of the wage increase . . . and because the Employer had full opportunity at the hearing to present evidence on this issue." *Id.* The Board held that the hearing officer erred because as a result of the withdrawal of the objection alleging the "bargaining from scratch" statement the employer was placed on notice that the statement was not going to be

litigated. Id. at 641. The Board did not discuss the hearing officer's contention that the "bargain from scratch" statement was closely related to the objection alleging a wage increase.

Together, *Iowa Lamb* and *Precision Products* establish the outer limits of the issues that are "reasonably encompassed" by the objections set for the election. Pursuant to *Iowa Lamb*, issues that are wholly unrelated to the objections and which have not been fully litigated are not "reasonably encompassed" by the objections. And, pursuant to *Precision Products*, issues that the parties have been specifically put on notice are not going to be litigated, by, for example, withdrawing the objection or the hearing officer specifically stating that he or she will not consider the issue, are not "reasonably encompassed" by the objections.

Some instructive examples of how hearing officers have applied the principles just described above are found in *Sawyer Lumber Co.*, 326 NLRB 1331 (1998); *J&D Transportation*, Case No. 22-RC-13090 (July 22, 2010), *available at* 2010 WL 3285382; and *Santa Rosa Memorial Hospital*, 20-RC-18241 (May 28, 2010), *available at* 2010 WL 3285399. In *Sawyer Lumber*, the employer objected to the election based on alleged misconduct by the Board Agent, including allowing the observers to take breaks during the voting, and taking a break himself, leaving the ballot box unattended, and that the union's observer had conversations with voters in the polling area as they waited to vote. *Id.* at 1331. At the hearing evidence was adduced that the Board Agent had mishandled blank ballots by leaving out on the table where he and the observers were seated where they could be tampered with. *Id.* at 1332. The Board upheld the hearing officer's determination that although the employer's objections did not include the allegation that the Board Agent mishandled the blank ballots that that issue was reasonably encompassed by the other objections dealing with alleged misconduct by the Board Agent. *Id.* at 1332, fn. 9.

In *J&D Transportation*, the administrative law judge held that disputed evidence relating to the union's election observer having conversations with voters in the polling place while they waited to vote was reasonably encompassed by the union's objections. The employer's objections alleged that the union's observer had used his cell phone during the voting, had continued using the cell phone during the voting after being instructed to stop by the Board Agent, and used the cell phone to engage in electioneering during the voting. The employer's objections did not specifically allege that the union's observer engaged in conversations with employees in the polling place while they waited to vote. At the hearing the evidence that he did engage in such conversations was adduced by the employer. The administrative law judge held that the disputed evidence relating to the conversations was reasonably encompassed by the employer's objections. The administrative law judge reasoned that there was "a sufficient nexus" between the disputed evidence and the employer's objection in so far as "the issues for resolution concern themselves generally with the conduct of the Union's observer during the time the polls were open." Id. at *5.

In *Santa Rosa Memorial Hospital*, the hearing officer held that disputed evidence concerning the Board Agents conversations with voters in Spanish were reasonably encompassed in the employer's objection that the Board Agent failed to monitor and prevent improper conduct by employees in the voting area. *Id.* at *17, fn. 23.

The ALJ erred in applying the reasonably encompassed standard to the facts of the instant case. The Employer was on notice from Union Objection No. 7 that the statements of the CEO at the captive audience meeting held two days prior to the election promising a wage increase in 2012 were to be litigated at the hearing. At that same captive audience meeting, the CEO also made statements promising other benefits. The unalleged promises of other benefits were made

by the same person in the same communication as the alleged promised wage increase. As such, the statements are sufficiently related to satisfy the reasonably encompassed standard. In each of *Sawyer Lumber, J&D Transportation*, and *Santa Rosa*, unalleged evidence regarding the conduct of a person was reasonably encompassed by the objections involving that same person but alleging different conduct that was nonetheless part of the same transaction or occurrence as the alleged conduct. That is exactly the circumstance present in the instant case. The statements concerning the promised wage increase in 2012 and the statements about the other promised benefits were both made by the same person, at the same time, in the same presentation. As such, they are sufficiently related to satisfy the reasonably encompassed standard.

B. The ALJ erred in finding that the Employer's promises during the critical period to provide a wage increase in 2012 and to grant other promised benefits was not objectionable.

The following principles are well-established:

> The Board will infer that benefits granted or promised during the "critical period" prior to a representation election interfere with the employees' free choice. The Employer may rebut this inference by providing a persuasive explanation, other than the pending election, for the timing of the grant or promise of benefits. *Dynacorp*, 343 NLRB No. 124, slip op. at 2 (2004); *D&D Plastics, Inc.*, 302 NLRB 245 (1991). As the Supreme Court has aptly put it, "Employees are not likely to miss the inference that the source of benefits now conferred is the source from which future benefits must flow and which may dry up if it is not obliged." *NLRB v. Exchange Parts Co.*, 275 U.S. 405, 409 (1964). . . . To be objectionable and unlawful, a promise of benefits need not be explicit. *See, e.g., County Window Cleaning Co.*, 328 NLRB 190, 196 (1999).

E.L.C. Electric, Inc., 344 NLRB 1200, 1201 (2005); *see also Sun mart Foods*, 341 NLRB 161 (2004); *Etna Equipment & Supply Co.*, 243 NLRB 596 (1979). "[T]he critical inquiry is whether the benefits were granted for the purpose of influencing the employees' vote in the election and were of a type reasonably calculated to have that effect. *United Airlines Services Corp.*, 290 NLRB 954 (1988). "As a general rule, an

employer's legal duty in deciding whether to grant benefits while a representation proceeding is pending is to decide that question precisely as it would if the union were not on the scene." *Id.*

It is not determinative that the decision to provide the enhanced benefit may have been made prior to the filing of the petition; under Board and court precedent the Respondent must also show that its announcement of the enhanced benefit "would have been forthcoming at the time made even if there were no union campaign." *Waste Management of Palm Beach*, 329 NLRB 198 (1999). Nor is it determinative that the employer disclaimed making "any promises," such disclaimer is "immaterial . . . if in fact [an employer] expressly or impliedly indicates specific benefits will be granted." *Michigan Products*, 236 NLRB 1143 (1978).

In the instant case, the Employer made improvements to employees' terms and conditions of employment and working conditions during the critical period, and also during the critical period made promises of further improvements. These inducements were made repeatedly throughout the critical period in the Employer's campaign literature, especially the FAQ and the Action Item List, and in a captive audience meeting delivered in-person by the Employer's CEO on the day before the election. As such, there is a presumption that such improvements and promises of improvements were made for the purpose of coercing employees' choice in the election.

The Employer has no legitimate explanation for the timing of these improvements. Although the wage increase was announced to employees at the facility prior to the start of the critical period, the other improvements were not announced to employees until after the Employer learned about the Union's petition. Nor is there any

believable evidence that the Employer made a decision to implement these improvements prior to the start of the critical period.

In any case, even if the decision to implement either the promised wage increase or the other improvements and promises of improvements had been made prior to the start of the critical period, it is clear that the Employer accelerated the announcement and implementation of them as a direct result of the Union's petition seems.

Moreover, everything about the Employer's conduct and discussion of the improvements evidences its fervent hope that the employees would respond to the improvements by voting against the Union. The Employer made such hopes explicit. In the FAQ, for example, the Employer stated in relevant part: "A vote 'no' is a vote for giving the Company at least one (1) year to continue demonstrating that Vertis is listening to your needs and addressing your concerns." (U. Ex. 14, pg. 5). Certainly, since the improvements were such a palpable part of the Employer's anti-Union campaign, it is reasonable to infer that they were implemented, or that their announcement and implementation were accelerated, for the purpose of coercing employees' choice in the election.

In *St. Francis Fed'n Nurses & Health Prof'ls v. NLRB*, 729 F.2d 844 (D.C. Cir. 1984), the court upheld a Board finding that the employer violated the Act by making implied promises of future benefits through numerous statements urging employees to give the new administrator "one year" to take care of the problems. Those are strikingly similar facts to the facts in the instant case. Here, as in *St. Francis Fed'n Nurses*, the Employer's promises of future benefits were made in tight conjunction with statements

urging the employees to vote against the Union and to give the Employer a year to continue implement the promised benefits.

Promises of future benefits made just prior to the election are objectionable. *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964). Promises made during the critical period that could have been delayed until after the election are objectionable. *NLRB v. Arrow Elastic Corp.*, 573 F2d 702 (1st Cir. 1978). Promises announced in a manner calculated to influence employees support for the Union are objectionable. *NLRB v. Rich's Plymouth*, 578 F.2d 880 (1st Cir. 1978); *DMI Distribution of Del.*, 334 NLRB 409 (2001). In the instant case, the Employer conducted a captive audience meeting on the day before the election where it reiterated promises made in the FAQ and Action Item List. The Employer easily could have delayed implementation of the Action Item list until after the election. Certainly the Employer has presented no explanation for the changes other than that they were desired by the employees. And, the Employer's manner of announcing the promised improvements was palpably calculated to influence employees' support for the Union.

Accordingly, the ALJ erred in dismissing Union Objection No. 7.

V. The ALJ erred in dismissing Union Objection No. 10.

A. The ALJ erred in finding that the unalleged evidence that high level managers and supervisors (other than the Employer's attorney) interrogated employees about their support for the Union is not reasonably encompassed by Union Objection No. 10 and could not be considered.

Union Objection No. 10 alleges that the Employer interrogated employees about their support for the Union.[6] At the hearing, there was testimony that high level managers and

[6] Union Objection No. 10 states:

supervisors other than the Employer attorney interrogated employees about their support for the Union. (The ALJ erroneously states that there is testimony only that one employee was interrogated. In fact, two employees – Echeverry and Pinaha – testified that they had been interrogated). The ALJ held that the testimony regarding these interrogations was not reasonably encompassed by Union Objection No. 10 and could not be considered. (Decision, pg. 10). The ALJ erred. The evidence is sufficiently related to the conduct alleged in Union Objection No. 10 to meet the reasonably encompassed standard. The alleged conduct and the unalleged evidence both involve interrogations of employees about their support for the Union. The Employer was on notice that the issue of interrogations would be litigated.

B. The ALJ erred in finding that the interrogations of employees about their support for the Union was not objectionable.

In determining whether an interrogation is coercive, the Board considers "whether under all the circumstances the interrogation reasonably tends to restrain, coerce or interfere with rights guaranteed by the Act." *Bloomfield Health Care Center*, 352 NLRB 252 (2008) (*quoting Rossmore House*, 269 NLRB 1176, 1178 fn. 20 (1984)). This is an objective standard, and it does not turn on whether the "employee in question was actually intimidated." *Multi-Ad Services*, 331 NLRB 1226, 1228 (2000). Among the factors that may be considered in making such an analysis are the identity of the questioner, the place and method of the interrogation, the background of the questioning, the nature of the information sought, and whether the employee is an open union supporter. *Stevens Creek Chrysler Jeep Dodge*, 357 NLRB No. 57 2011 (2009).

The Employer destroyed the laboratory conditions necessary for a fair election when the Employer's attorney admitted to interrogating eligible employees regarding their Union sympathies during the voting.

In the instant case, voters Echeverry and Pinaha were interrogated by high level managers and supervisors about their support for the Union during the critical period. There is no evidence that Echeverry or Pinaha were open or known Union supporters. Echeverry was interrogated by Geiger and Flood, both high level managers. Geiger was brought to the Facility after the Employer learned about the Union petition, had no defined role at the Facility until August 29, and, so, Echeverry could reasonably infer was brought to the Facility solely because of the Union. Geiger eventually received the supervisor position of Manufacturing Manager. Flood was the Senior Vice President of Operations, a high level management position. Neither Geiger nor Flood had ever spoken to Echeverry before, and neither had any reason to speak to Echeverry when they did other than to interrogate him about his support for the Union. In each case, they approached Echeverry at his work station, but did not ask him or tell him about any work-related matter. Instead, in each case, they asked Echeverry what he thought about the Union, without any prompting by Echeverry. They did not tell Echeverry that he did not have to speak to them about the Union if he did not want to. For his part, Echeverry said he was afraid to tell them that he supported the Union. Flood also disparaged the Union, making it clear that discussing the Union was the purpose of his initiating the conversation, and also making clear that Flood hoped Echeverry would also oppose the Union.

Pinaha was interrogated by Pophally, Pinaha's immediate supervisor. Pophally approached Pinaha in the kitchen. Without prompting, Pophally asked Pinaha about his support for the Union. Pophally did not provide any valid reason for asking the question or any disclaimer that Pinaha was not required to answer. Pophally did not discuss at that time any work-related matter or anything else other than the Union.

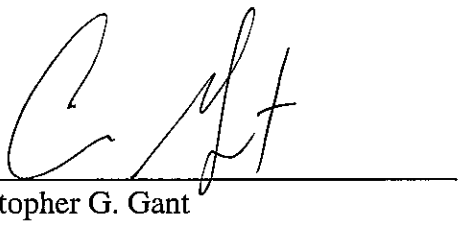
Under these circumstances, it is clear that the interrogation of Echeverry and Pinaha was coercive and should result in the election being set aside. The ALJ erred in dismissing Union Objection No. 10.

Conclusion

For all of the reasons stated above, the Union respectfully submits that the ALJ erred in dismissing the Union's challenges to the ballots of Swercheck and Diaz, and in dismissing Union Objections Nos. 3, 7, and 10.

Dated: January 5, 2011
New York, NY

Respectfully submitted,



Christopher G. Gant
Kennedy, Jennik & Murray, P.C.
113 University Place, 7th Floor
New York, NY 10003